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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 355.

TRINITYFARM CONSTRUCTION COMPANY, *Appellant*,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS FOR THE STATE OF LOUISIANA.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANT.

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Appeal from the District Court of the United States for the Eastern District of Louisiana.

(Reported below: 3 F. Supp. 785.)

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Appellant, plaintiff below, filed its bill of complaint in the District Court of the United States for the Eastern District of Louisiana against appellee, defendant below, as Supervisor of Public Accounts of the State of Louisiana, her

agents and representatives, to enjoin appellee, her agents and representatives, from seeking to collect from appellant excise taxes upon gasoline used by appellant in performing certain levee construction contracts between appellant and the United States of America. (R. 1.)

The statutes of the State of Louisiana levying the taxes complained of are designated as Act No. 6 of the Special Session of 1928 as amended by Act 8 of 1930 as amended by Act 16 of 1932 and Act No. 1 of the Extraordinary Session of 1930, the latter act being in form an amendment to the state constitution.

The relevant portions of Act No. 6 are:

> "Section 1. Be it enacted by the Legislature of Louisiana, That there is hereby levied a tax of four cents (4c) per gallon on all gasoline, or motor fuel, sold, used or consumed in the State of Louisiana for domestic consumption, to be collected as hereinafter set forth.
>
> "* * * * * * *
>
> "Section 2. The aforesaid tax of four cents per gallon shall be collectible from all persons, firms, corporations or associations of persons, engaged as dealers in the handling, sale or distribution of such products within the State of Louisiana, the method of collection to be as prescribed in Section 4 of this Act. The term 'dealer' as used in this Act is defined to mean any person, firm, corporation or association of persons, who produces, refines, manufactures, blends or compounds gasoline or motor fuel for sale to the jobber or consumer, or to the persons, firms or corporations, or associations of persons who, in turn, sell to the jobber or consumer. The term 'dealer' is further defined to mean the person, firm, corporation or association of persons who imports such gasoline or motor fuel from any other State or foreign country for distribution, sale, or use in the State of Louisiana. On all gasoline or motor fuel imported from other States and used by him, the 'dealer' as thus defined shall pay the tax on the amount so imported and used, the same as if it has been sold for domestic consumption."

Act No. 1 of the Extraordinary Session of 1930 is identical in legal effect with Act No. 6, except as to the rate of levy and the allocation of the proceeds of the tax. The two statutes taken together purport and undertake to levy a tax of five cents per gallon on all "gasoline * * * sold, used or consumed in the State of Louisiana for domestic consumption."

Appellant, a Delaware corporation with appropriate charter powers, alleged that it had entered into contracts with the United States to construct two certain levees along the Mississippi River within the State of Louisiana; that it had purchased for the performance of such contracts a large amount of equipment including dragline machines, trucks, tractors, graders, wagons and gasoline; that such gasoline was purchased wholly outside the State of Louisiana and shipped in tank car lots in interstate commerce to appellant's storage tanks on Government-controlled levee right-of-way; that such gasoline was wholly consumed and used in performance of said contracts with the United States and that no portion thereof was used on the public roads, highways or bridges of the State of Louisiana.

Appellant alleged that appellee, her agents and servants, had seized two carloads of such gasoline under attachment and that they threatened to and would seize the remainder thereof unless restrained by order of court; that appellant was without adequate remedy at law and would suffer irreparable damage if relief were denied.

Appellant denied liability for the tax imposed on the ground that the same imposed a direct burden upon its contracts with the United States; that the statutes imposing such tax are unconstitutional, null and void in that the operation and effect thereof and of acts done and threatened pursuant thereto would be to burden, retard and impede operations of the General Government undertaken pursuant to its Constitution and Laws, and to deprive appellant of rights conferred thereby.

Prayer was for a temporary restraining order, a preliminary and a permanent injunction.

A temporary restraining order was granted as prayed for (R. 9) and a statutory court of three judges was convened.

Appellee filed her answer (R. 11) in which she admitted jurisdictional facts alleged by appellant but denied that appellant was without adequate remedy at law or that the statutes in question or any acts or things done pursuant thereto were violative of the Constitution or laws of the United States or of the State of Louisiana.

Appellee further denied that the gasoline in question was a part of appellant's equipment or that the State of Louisiana intended to impose any burden on the use by appellant of such equipment as it was necessary for appellant to employ in performing its Government contracts.

Appellee denied that the tax complained of was laid upon the use by appellant of its gasoline in performing its contracts with the United States and alleged on the contrary that such tax was levied upon appellant for the privilege of engaging as a "dealer" in the distribution, use or sale of gasoline in Louisiana; that the tax accrued when the gasoline imported by appellant came to rest in appellant's storage tanks, and that the ultimate use of such gasoline by appellant in performing its Government contracts was immaterial since the taxable status and situs of such gasoline was fixed prior to such use.

Answering affirmatively, appellee alleged upon information and belief that appellant had included the tax complained of in its costs; that it had not offered to restore or return to the Government any sum which it might save if relieved of paying such taxes; that it had not offered to do equity; that appellant's action was an effort to enrich itself at the expense of the State and of the United States and, if upheld, would constitute a fraud upon both.

Appellee further answered, in the alternative only, that the statutes in question had not been held void by any com-

petent court; that they were presumed to be valid and that appellant was charged with knowledge of the tax imposed; that its failure to include the amount of tax as part of the basic cost of work contracted to be done by it for the United States constituted lack of diligence and laches which should bar appellant's right to equitable relief.

An agreed statement of facts (R. 23) was filed admitting the existence of jurisdictional facts, the charter power of appellant, the making and existence of appellant's contracts with the Government pursuant to the Act of May 15, 1928, the importation by appellant of gasoline for use exclusively in performance of such contracts, the storage of such gasoline by appellant in its storage tanks at Newellton, Louisiana, and in other tanks belonging to appellant situated on Government levee right-of-way; the withdrawal by appellant, as needed, of such gasoline from its storage tanks and use thereof exclusively in performance of such contracts; that equipment used by appellant on such contracts, such as dragline machines, trucks, tractors et cetera, was its customary equipment acquired prior to the making of such contracts, that gasoline is an essential fuel for such equipment; that the selection by appellant of equipment requiring gasoline as fuel was not a requirement of the United States under such contracts, but that in making its bid to the Government upon each of such contracts appellant was required to and did submit to proper representatives of the Government a list of machinery which it proposed to use in performing such contracts, respectively, if awarded to it, which machinery consisted of draglines, tractors, trucks et cetera; that appellant has not obligated itself nor is it obligated by such contracts to reimburse or return to the United States any tax or portion thereof which it may be relieved from paying to the State of Louisiana as a result of this suit; and that appellee instituted suit for collection of the questioned tax and caused the two carloads of gasoline to be seized under attachment as alleged and

that, unless restrained in this proceeding, she proposes to continue similar efforts to enforce collection of such tax.

The following additional evidence was introduced:

(a) Standard Government Form of Contract between the United States of America and Trinityfarm Construction Company for construction of Kempe-Lake St. John Levee. (R. 29)

(b) Affidavit of J. D. Kirven, Vice-President, Director and General Manager of Trinityfarm Construction Company (R. 40) wherein affiant deposes that he has personal knowledge of the manner in which appellant prepares its bids for work to be performed for the United States Government; that appellant uses in its operations a large amount of power driven machinery in the operation of all of which gasoline is essential; that in determining the amount of appellants bid on any piece of work for the United States the actual cost of completing same is computed and divided by the number of cubic yards of material required to be moved and to the quotient so obtained is added a profit per cubic yard deemed fair and reasonable under the circumstances of the particular case, the sum resulting being the bid price of appellant; that gasoline is used in large amount in performing such contracts and its cost delivered on the job is a material item of expense included in determining the cost of any job upon which a bid is submitted; that the appellant's bids on the contracts involved in this suit included the cost of gasoline necessary to perform the work required; that the cost of such gasoline was calculated in compiling such bids on the basis of purchase at wholesale in carload lots without addition of any sum whatever to cover excise taxes claimed by the State of Louisiana for the privilege of using such gasoline in the performance of such work; that the bid of appellant to the United States would have been proportionately higher in each instance if such excise tax had been included in the cost of said gasoline, and that bids of ap-

pellant to the United States for future work will be proportionately higher if such tax is imposed;

(c) Affidavit of Justin C. Daspit (R. 42) formerly Assistant Supervisor of Public Accounts of the State of Louisiana and presently counsel for said Department wherein affiant deposes that it was part of his duties to enforce the gasoline tax statutes of the State of Louisiana; that it has been and is the policy of said Department to regard contractors with the United States Government for levee construction work as independent contractors, and not as agencies or instrumentalities of the United States Government, this policy being predicated upon an opinion of the Attorney General of said State dated Aug. 27, 1930, and duly published in the "Opinions of the Attorney General of Louisiana"; that pursuant to such policy application of Trinityfarm Construction Company (appellant here) for refund of gasoline taxes paid by it from Dec. 1, 1930, to June 30, 1932, was denied and that the payment of gasoline tax by appellant and its application for refund thereof disclose that appellant had both actual and constructive knowledge of such tax and notice that the amount thereof should be incorporated in the price of its aforesaid bids for levee construction work as part of the basic cost thereof.

(d) Affidavit of William A. Cooper (R. 44), Assistant Supervisor of Public Accounts of the State of Louisiana, wherein affiant deposes that he has active charge of enforcing the questioned statutes; that the revenues of the State of Louisiana thereunder approximate a minimum monthly average of $700,000.00; that monthly reports to the State Treasurer are required in which refunds under Sec. 14 of such acts are not included; that the funds in the hands of the Supervisor of Public Accounts of Louisiana at the end of each month, and before settlement with the Treasurer, are sufficient in amount to meet any legitimate claim for refund of such taxes, even up to the amount of total tax collections if necessary; that such Supervisor always has on hand in cash a monthly minimum average of $12,000,

and that where an unliquidated claim for refund is pending it is the policy of the Supervisor to withhold in settlement with the State Treasurer an amount sufficient to satisfy such claim if established.

A preliminary injunction was granted as prayed for by appellant on Dec. 7, 1932 (R. 46); the cause was submitted on the merits Jan. 19, 1933 (R. 51); reargument called for by the Court on its own motion (R. 47) was submitted Mar. 16, 1933, and final decree was entered June 15, 1933 (R. 51) recalling the interlocutory injunction previously granted, denying appellant's prayer for injunction and dismissing its bill of complaint for reasons assigned in Findings of Fact and Conclusions of Law (R. 47) filed June 12, 1933.

Petition for Appeal (R. 52) was seasonably filed, Order Allowing Appeal (R. 54) was entered July 14, 1933, Assignments of Error were filed on the same date and the cause is now presented for review.

ASSIGNMENT OF ERRORS.

The District Court erred:

1. In denying plaintiff's prayer for a permanent injunction.

2. In recalling the interlocutory injunction issued herein.

3. In dismissing plaintiff's bill of complaint.

4. In failing to hold that the contracts between plaintiff and the United States for the construction of levees on the main stem of the Mississippi River are "Federal Instrumentalities."

5. In failing to hold that gasoline used by plaintiff exclusively in the performance of such Federal contracts is a part of plaintiff's equipment, and, as such, exempt from excise taxes sought to be levied by the State of Louisiana.

6. In failing to hold the excise tax complained of unconstitutional and void, as imposing a direct burden upon the performance by the Federal Government of its delegated powers.

7. In holding that the State of Louisiana may impose a direct burden upon the contracts between the United States and plaintiff by exacting from plaintiff payment of an excise tax for the privilege of using its equipment in the performance of such contracts.

8. In failing to hold that the statutes complained of, as administered by the State of Louisiana, are unconstitutional and void insofar as the same purport to levy an excise tax upon plaintiff for the privilege of using its gasoline wholly and exclusively in the performance of its contracts with the United States.

9. In failing to hold that the statutes complained of could have no application to gasoline used wholly and exclusively by plaintiff in the performance of its contracts with the United States, and that, if such application were intended, it was beyond the power of the State of Louisiana to levy such excise tax.

10. In holding that the State of Louisiana has power to levy and collect an excise tax from plaintiff for the privilege of using its gasoline solely in the performance of its contracts with the United States.

11. In holding plaintiff liable for payment of an excise tax for the privilege of using its gasoline solely in performance of its contracts with the United States.

12. In holding plaintiff liable for payment of the excise tax complained of when such tax is laid solely upon the use by plaintiff of its gasoline in performing its contracts with the United States.

13. In holding plaintiff to be a "dealer" in gasoline, and as such liable for the payment of an excise tax on gasoline, used exclusively and wholly by plaintiff in the performance of its contracts with the United States.

SUMMARY OF ARGUMENT.

Point No. 1.

The contracts existing between the United States and appellant for the construction of levees on the main stem of the Mississippi are means adopted by the Federal Government for carrying out its delegated powers.

Point No. 2.

The statutes complained of impose a direct burden upon the contracts existing between the United States and appellant.

Point No. 3.

The State is without power to impose the tax.

Point No. 4.

Appellant is without adequate remedy at law.

ARGUMENT.

Point No. 1.

The contracts existing between the United States and appellant for the construction of levees on the main stem of the Mississippi River are means adopted by the Federal Government for carrying out its delegated powers.

Congress was granted full jurisdiction over the Mississippi River by the commerce clause of the Constitution (Art. 1, Sec. 8, cl. 3) and has exercised its power by appropriate legislation. U. S. C. A. Tit. 33, Ch. 12, secs. 621 to 631, inclusive; Ch. 15, secs. 702 to 702m, inclusive; Act May 15, 1928, c. 569; 45 Stat. 334.

The effect of this constitutional provision and of the statutes enacted pursuant thereto is to vest in the Federal Government exclusive power to control and improve the Mississippi, and plans which it may devise and means which it may adopt to that end are wholly within its discretion and free from interference in any form by the several states.

In the exercise of this exclusive power Congress has made it the duty of the Secretary of War to apply available funds for improvement of rivers and harbors "by contract or otherwise" as may be most economical and advantageous to the Government. (Tit. 33, Ch. 12, sec. 622) In discharge of this duty the Secretary of War has caused to be executed and delivered to appellant the two construction contracts here involved.

Contracts so authorized and executed on behalf of the Government have repeatedly been held to be Governmental means or instrumentalities. See Gillespie vs. Oklahoma, 257 U. S. 501, holding that the owner of a Government oil lease contract on restricted Indian lands was a Governmental instrumentality; Indian Territory Illuminating Oil Co. vs. Oklahoma, 240 U. S. 522, holding similar mineral lease contracts in the hands of an assignee immune from state taxation; Choctaw O. & G. Co. vs. Harrison, 235 U. S. 292, holding the operator of coal mining lease contracts on

Indian lands a Federal instrumentality and its gross receipts exempt from an occupation tax; and, reciprocally, Burnet vs. Coronado Oil & Gas Co., 285 U. S. 393, wherein this Court said, with reference to a mineral lease executed by the State of Oklahoma for the benefit of its school children: "Here the lease to respondent was an instrumentality of the State for the purpose of carrying out her duty in respect of public schools. To tax the income of the lessee arising therefrom would amount to an imposition on the lease itself."

Contracts here under consideration between the United States and appellant differ in no important respect from those construed in the cases above cited and are agencies through which the Government "immediately and directly exercises its sovereign powers." Metcalf vs. Mitchell, 70 L. Ed. 384. As such they are immune from the taxing power of the State.

Point No. 2.

The statutes complained of impose a direct burden upon the contracts existing between the United States and appellant.

The questioned statutes, by their terms and as interpreted by the Supreme Court of Louisiana, purport to impose an excise or privilege tax, not a tax upon the gasoline itself. In State vs. Johnson, 138 So. Rep. 503, the Supreme Court of Louisiana had before it Act 6 of the Extra Session of 1928. In construing the statute, there relied upon by the State to impose a tax upon gasoline purchased within the State but used in interstate commerce outside the State, the Court said:

> "This is an excise, not a property, tax. The tax is laid, not upon the gasoline, but upon the right or privilege of selling, using or consuming it; the amount to be paid being based on the quantity involved. Lionel's Cigar Store vs. McFarland, 162 La. 956; 111 So. 341; Fleischmann Co. vs. Conway, 168 La. 547; 122 So. 845.

"The title to the Act 6 of Extra Session of 1928, page 14, reads in part:

> "'To provide revenues for the public highways of the State of Louisiana by levying a tax of four cents per gallon on all gasoline or motor fuel sold, used or consumed in the State of Louisiana for domestic consumption.'

"Section 1 of the act, so far as it refers to the levying of the tax, reads as follows:

> "'That there is hereby levied a tax of four cents (4c) per gallon on all gasoline, or motor fuel, sold, used or consumed in the State of Louisiana for domestic consumption.'

"Conceding that defendant is a 'dealer' in gasoline as defined by the act, in that it distributes the gasoline in this State, it does not follow that it must pay the tax on all the gasoline 'distributed', by virtue of the provision in section 2 of the act to the effect that the tax shall be paid by all who import gasoline into this State for 'distribution'. The word 'distribution' appears first in section 2 of the act, which defines the term 'dealer'. It does not appear in either the title, which indicates its purpose, or in Section 1, which levies the tax. It is therefore clear that the State has not levied the tax on any gasoline except such as is 'sold, used or consumed in the State of Louisiana'."

The construction placed upon the questioned statutes by the Supreme Court of Louisiana is binding upon this Court. Louisiana vs. Pillsbury, 105 U. S. 278; Brown vs. New Jersey, 44 L. Ed. 119; West vs. Louisiana, 194 U. S. 258; Missouri vs. North, 271 U. S. 40; Dorchy vs. Kansas, 272 U. S. 306. This construction expressly excludes from the burden of the tax the "distribution" of gasoline and, by unmistakable inference, similar acts of "storage" and "withdrawal" made the basis of decisions of this Court in Nashville etc. R. R. vs. Wallace, 77 L. Ed. 444, and Edelman vs. Boeing Air Transport, Inc., 77 L. Ed. 754.

There being no sale involved in the instant case, the tax can arise, if at all, solely with reference to gasoline "used or consumed". What is the meaning of this phrase in view of the holding of the Supreme Court of Louisiana in the Johnson case, *supra?* The "use" actually involved in that case was "consumption"—the explosion of gasoline for fuel. The State Court held "use" alone—not distribution —was the taxable act. Could the State Court hold "distribution" of gasoline beyond the operation of the statutes and at the same time hold essential acts involved in "distribution", such as "storage" or "withdrawal" therefrom, subject to its terms? With utmost deference, in view of the recent disposition of American Airways vs. Grosjean, 78 L. Ed. 116, we submit that the Supreme Court of Louisiana has construed the words "used" and "consumed" in these statutes to be synonymous and interchangeable and has limited the application of the tax, in the absence of a sale, to a single class of transactions, namely, the application of gasoline to some one or more of its practical and well understood purposes. The fact that gasoline is a volatile fluid, incapable of practical use without consumption by explosion or evaporation lends force to this contention. Eliminating, as we must, "distribution" and the uses incident thereto which have been the basis of the interstate commerce decisions typified by the Nashville case, it is difficult, if not impossible, to conceive of a practical use of gasoline which does not, at the same time, result in its consumption.

But while we earnestly believe and here contend that such is the meaning and effect of these statutes as construed by the Supreme Court of Louisiana, that construction is not essential to appellant's right to relief. It would simply free the case from all difficulty. Helson vs. Kentucky, 279 U. S. 245.

If, however, we are in error and "use" is held to mean "withdrawal" from storage, the tax upon the privilege of withdrawal, under the facts in this case, is a direct burden

on the Federal contract between the United States and appellant and, as such, must fail.

In the interstate cases above cited the act of withdrawal is held to have been completed before interstate commerce began and the burden of the tax with respect thereto is held too remote. That the tax in each case was a burden on commerce is not questioned. The decisions impress us as entirely sound as applied to interstate commerce, especially in the Nashville case where acts of storage and withdrawal were, by the language of the statute in question, made the subject of the tax.

But, as said by Mr. Justice Holmes in Gillespie vs. Oklahoma, *supra*, distinguishing between attempts by a state to levy taxes on transactions in interstate commerce and upon the operation of the Federal Government. "The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance."

An examination of the facts here involved will demonstrate that the burden of this tax upon the Federal contracts is direct, even if "use" be given the most comprehensive meaning yet accorded to it.

Appellant, by its contract, bound itself to construct for the Government a levee and to supply all labor, supplies and equipment necessary therefor. It was a single, indivisible undertaking, covered by a single performance bond, and it comprehended every act necessary to be done from the first breaking of ground to the delivery of the completed levee. Among essential acts required to be done throughout the work was the securing of machinery and of fuel for its operation.

The Government, as was its exclusive right, approved the type of machinery used by appellant. For that machinery gasoline is an essential fuel. It was required in large amount and appellant purchased it in carload lots outside the State of Louisiana. It is agreed that the gasoline was purchased and imported for use exclusively in performance of the Federal contracts.

Appellant provided, as part of its equipment in performing its contracts, its own storage tanks in which its gasoline was stored at or near the contract sites and from which it was withdrawn as needed and consumed exclusively in the contract work.

Up to the time the gasoline came to rest in appellant's storage tanks it was in interstate commerce and no contention is made that it was subject to the questioned tax. It was then stored in appellant's tanks, on or near appellant's work and was a part of appellant's equipment, assembled for performance of its Federal contract. In no respect did it differ from the tanks which contained it or from the tractors and trucks in which it was presently to be consumed. Like them it had been brought to the site solely and exclusively because the Federal contract had been made and *was then actually being performed*. Every act with respect to the gasoline which could possibly be subject to the tax of necessity occurred after and not before the performance of the Federal contract had begun—a situation wholly different from that passed upon in the interstate commerce cases where the taxable acts were completed *before* interstate transportation commenced.

After the gasoline came to rest in appellant's storage tanks it was "used" in four ways, in the broadest possible sense of the word. It remained stored where it was; it was withdrawn from storage; it was put in appellant's fuel tanks and it was there exploded and consumed as engine fuel in actual levee construction.

Any single act enumerated might conceivably be selected as a taxable use, but not more than one. Since the statutes in terms purport to tax with respect to consumption, the temptation is strong to insist upon the final act, but in this we may be in error. Withdrawing the gasoline from storage tanks and putting it in the fuel tanks approach perilously near to "distribution", a use expressly held beyond reach of the tax. The statutes are silent as to storing but

it may be that the keeping and conserving of fuel is, in law, its use.

In legal effect it matters not at all which act the State may select as the basis of its levy. Each act occurs after and not before the Federal contract is commenced; each act is part performance of that contract; each act is done solely because of the Federal contract; each act adds part of the cost or expense of performing the Federal contract; each act is essential to the performance of that contract.

Taking storage, then, as the taxable act—the selection most adverse to appellant since it is most remote from actual levee construction—let us examine the effect of a State excise upon that privilege. If permissible it may not be limited in amount. Nor may the objects of the excise with logic be restricted.

If the state may tax the storage of gasoline used in performing a Federal contract, it may not be denied the power to tax the storage of coal, oil or other fuel or, for that matter, the "storage" of draglines or other equipment while not actively engaged in work upon the contract. The same principle applies in each instance and beyond its mere statement nothing is required to demonstrate its fallacy.

Surrender to the State the right to tax any one of the acts enumerated and it will have power to destroy the contract; to defeat the ability of the Government to enter into such contracts.

Argument is unnecessary as to the effect of an excise upon any one of the acts enumerated. It is in evidence and undisputed that the asserted tax would add to the cost of the work; that the bid price of appellant to the Government would have been higher upon these identical contracts had appellant conceded the validity of the asserted tax; that future bids will be proportionately higher if the tax is sustained. A burden more direct upon the contract, and through it upon the Government, cannot easily be conceived —a burden falling with equal force and certainty regardless of the act subjected to the tax.

Point No. 3.

The State is without power to impose the tax.

The invalidity of taxes of this nature is established by an unbroken line of decisions of this Court. The leading case is McCulloch vs. Maryland, 4 Wheat. 316. The facts in the Maryland case are familiar to all informed lawyers, and the profound effect of that decision upon the development of the Union for more than one hundred years is uniformly recognized. There, as here, a State had attempted, through imposition of a tax, to burden the operation of a means selected by Congress for the performance of a Federal function. The Court, in an opinion by Chief Justice Marshall, announced doctrines from which there has been no substantial departure, and upon which the power of the Federal Government largely depends to this day. The Court struck down the State tax upon the ground that the Federal power is expressly and of necessity supreme within its jurisdiction: that the power to create implies the power to protect, and that there is no protection where another sovereignty can exercise power to tax the means selected by the Federal Government.

There the means consisted of a bank operating under a Federal charter, a contract of an especial nature with the Federal Government. Here the means consists of a contracting corporation selected by the Government, and operating under a contract with the Executive Department of the Government. The analogy is complete, and the limitation upon the State of Maryland applies with equal force to the State of Louisiana.

In disposing of the contentions of the State of Maryland adversely to it, Chief Justice Marshall used the following language, marked alike for its clarity and force:

> "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution

powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. * * *

"* * * We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

"We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise. * * *

"The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This, we think, the unavoidable consequences of that supremacy which the constitution has declared."

A similar question arose in the case of Stockton vs. Baltimore Railway Company, 32 Fed. 9, and was there decided in an opinion written by Mr. Justice Bradley which subsequently had the full approval of the Supreme Court, first, in Pembina, etc. Co. vs. Pennsylvania, 125 U. S. 181, and later in Horn Silver Mining Company vs. New York, 143 U. S. 302.

In the last mentioned case, in speaking of the limitation

upon the power of a State to exclude or control the activities of a foreign corporation, it is said:

> "The other limitation on the power of the State is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think by the late Mr. Justice Bradley in Stockton vs. Baltimore & N. Y. Ry. Co., 32 Fed. Rep. 9, 14. As that learned Justice said: 'If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union.' And this Court, in citing this passage, added, 'without the permission and against the prohibition of the State.'" Pembina & Co. v. Pa., 125 U. S. 181; 31 L. Ed. 650.

In the Pembina case, the Court, after announcing the doctrine as above quoted, used the following language:

> "And undoubtedly a corporation of one State, employed in the business of the General Government, may do such business in the other States without obtaining a license from them."

In Sault Ste. Marie vs. International Transit Company, 234 U. S. 333, an attempt was made by a city to require the payment of a license fee for the maintenance of a ferry between a boundary State and Canada. The Supreme Court denied the power to impose the license fee upon the ground that the ferry was a means used in the promotion of foreign commerce, and that, as such, its operation was beyond the power of any State or municipality to regulate or control by the imposition of a license fee. There, as here, the power of Congress arose through the force of the Commerce Clause of the Constitution. The fact that the operation of the ferry was a direct transaction in foreign commerce, and therefore exempt from the imposition of a license fee, while here the transaction is an incidental aid to commerce in protecting a national waterway, detracts nothing from the force of the principle, which exempts every

governmental means from liability to the State for any character of license, privilege, or excise tax.

In Panhandle Oil Company vs. Mississippi, 277 U. S. 218, the doctrine was given an application much more far-reaching than is required in the instant case. There the State sought to collect from the oil company sales taxes upon sales made by the oil company to the Coast Guard and the Veteran's Hospital, both being Federal undertakings. Upon the ground that the collection of such a tax imposed a burden upon the operation of governmental undertakings, the power of the State to impose the tax was denied. Manifestly, the operation of the tax complained of was remote, as compared to the effect of the excise here sought to be collected by the State, for the use by the contractor of equipment necessary to the performance of his contract with the Government. It was not apparent that the operation of the tax had increased the cost to the Government of the gasoline in question, or that the Government would receive any benefit from the remission of the tax. Here it is undeniable that the collection of the excise will add to the contract price which the Government must hereafter pay for the performance of the work which it requires to be done, and it is conceivable that excise taxes of this character, if permitted upon the use of equipment of contractors in governmental work, would come to constitute a very considerable portion of unit prices which the Government would be required to pay.

In Helson vs. The State of Kentucky, 279 U. S. 245, the Court was called upon to examine a question identical in principle with the one under consideration. The State, in that case, undertook to levy an excise upon the use of gasoline for power in the operation of an interstate ferry. In holding this attempt to be beyond the power of the State, the Court said:

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for us-

ing a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a State upon the interstate commerce transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected."

The doctrine announced, sound beyond peradventure, and now the established law of the land, applies, in every detail, to the present case. Here, as there, the tax was sought to be laid upon the use of gasoline. Here, as was there expressly recognized by the Court, the claimed power to tax the use of gasoline would carry with it as a necessary corollary the power in the State to tax the use of every piece of equipment employed by the contractor in performance of its contract with the Government.

No one will be heard to question the soundness of the rule laid down in the Helson case in the following language: "A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce." Could a different rule possibly apply if the sentence read: "A tax which falls directly upon the use of one of the means by which a government contract is carried on directly burdens that contract?"

There can be but a single answer to the question. Precedent and reason combine to demonstrate that such a tax does, in fact, directly burden the contract.

If the power of the State of Louisiana to collect the excise claimed upon the use of gasoline, under the circumstances of this case, should be sustained, the power of the Federal Government to utilize private contractors as a medium for the performance of public work would be at an end.

It must be constantly borne in mind that the excise here sought to be collected is upon the use by the contractor of its equipment, and not upon its sale. As said by the Court in Hart Refineries vs. Harmon, 278 U. S. 499:

> "The difference between an excise tax based on sales and one based on use of property is obvious and substantial."

The immunity here sought to be established is against the assumed power of the State to lay a tax upon the use of equipment devoted exclusively to the performance of a public contract—an immunity essential to the continued use by the Federal Government of means which it has adopted from the beginning in carrying out its delegated powers.

The instances in which this Court has restrained the various States from imposing burdens upon operations tending to promote the objects of the Federal Government are as varied as are those objects themselves, but the controlling principle announced in each case is the one first stated in McCulloch vs. Maryland, which denied to the States for all time any power "by taxation, or otherwise, to retard, impede, burden or in any manner control, the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general Government." Language more positive and comprehensive could not be found. The immunity is absolute in every case where the effect of the tax will be to retard, impede, burden, or in any other manner, control the operation of the Federal law. Any relaxation of the rule would be an intolerable invasion of essential Federal power.

We find neither decision nor logic supporting the claim here asserted by the State. On the contrary numerous precedents of ultimate authority deny its existence.

Certain propositions are proved by mere statement. The supreme and exclusive power of the Federal Government

over subjects delegated to it is no longer questioned. It is and, of necessity must be, given universal application.

Its meaning is plain when thoughtfully considered. It goes not merely to the object delegated but to the methods of its attainment. When the people delegated to the Fedral Government the power "to regulate commerce with foreign nations, and among the several states * * *" a cession of surpassing importance was fully completed. Thenceforth the voice of every State was stilled not as to the defined types of commerce alone but as well as to every method, means, instrumentality, or agency which the Congress, in its sole discretion, might adopt to regulate such types of commerce within the broad meaning which that term has come to have. As to such delegated powers and the methods of their exercise it is as though the several States had ceased to exist. They have been correctly described as powers belonging to the whole people and by them reposed in the General Government for exercise by it for the benefit of the people as a whole without regard to the interests of the several States as such, "without the permission and against the prohibition of the State."

The contracts upon which the Construction Company is engaged reach back for their source to the power granted in the quoted clause. Congress, in aid of commerce, has undertaken the flood control plan. Its discretion alone has determined what should be done and how it should be accomplished. All of the States combined have been and are powerless to control in any particular the exercise of that discretion.

Congress has the exclusive selection of the processes or ways or means by which this plan may be accomplished. It has seen fit to authorize the making of contracts upon competitive bids for various portions of the work. Its right to do so cannot be brought in question.

Having selected this process, method, way, means or instrumentality for attaining the object delegated to it, the Federal Government retains the exclusive power to direct

and to protect its operation. No State may say when such a contract shall be made, how it shall be performed or where or upon what terms. It is not a question of degree; it is the total lack of power in the State; a power which never had existence.

If, then, the State is wholly without power of any character with respect to the contract, how can it seriously assert the right to impose a direct burden upon it? The right to burden with a tax rests upon the existence of power—of jurisdiction—over the subject matter. Failing that power no right exists. If it be conceded, as it must be, that the State has no jurisdiction over such a contract, that it is not "a thing which exists by its own authority, or is introduced by its permission", then it must follow that the right to burden the contract directly by a tax is one which never existed.

We submit that no State has power to exact an excise from a contractor as the price of his right to use any portion of his equipment in carrying out of his contract with the Federal Government. The lack of power would not be more apparent if the contract were being performed in Alaska instead of within the borders of the State of Louisiana. The total absence of jurisdiction defeats the effort in the one case as in the other. Federal power knows no State lines; it is national in scope as it is exclusive in effect. Federal power is Federal jurisdiction and in fields which it occupies States may not intrude.

Confusion has arisen through use of terms less plain and comprehensive than those in which the principle was first announced but there has not been, and cannot be, any departure from the rule itself. It was deemed wise by Chief Justice Marshall and the great Court over which he presided to use simple terms of recognized meaning rather than to employ those of a technical or artificial significance. Throughout he speaks not of "agencies" or "instrumentalities" of the Government, but always of "means" which are employed by Congress or by the Government of the

Union and when, in the final paragraph quoted, he comes to express finally the total absence of the asserted power in the State, it is as to "the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

The language of the Court is plain and its meaning is unmistakable. Men may become confused as to what constitutes an "agency"; legal concepts are involved and technical considerations enter. "Instrumentality" is defined by a leading authority as "anything used as a means or an agency; means; medium; agency." The word could have been adopted by the Court but not to advantage.

No man of average learning fails to understand what is intended by the word "means". It is a word in common use, a general and comprehensive term, apt indeed for the expression of a principle vital to the existence of a nation. It is all-inclusive. No method or process which Congress may select falls outside its fair intent.

The confusion has arisen not, we believe, over the right of a State to burden directly a means employed by the Federal Government but rather over the question as to whether the burden was direct or so remote as to fall outside the rule. When it is asserted a contract with the Federal Government is not a means selected by Congress for carrying out its delegated powers careless thinking or want of knowledge is apparent. That the holder of such a contract is not an agent in the strict legal sense may be admitted; that the contract is a means to the delegated end may not be intelligently denied.

What is meant, most frequently, is that the incidence of the tax on the governmental means is not admitted or, if it exists, that it is too remote.

A forceful statement of the rule, applicable especially to Government contractors such as appellant, is found in Osborn vs. Bank, 9 Wheat. 737 at 865, where Chief Justice Marshall said:

"But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the State to control its operations, if those operations be necessary to its character as a machine employed by the government, cannot be maintained. *Can a contractor* for supplying a military post with provisions, be restrained from making purchases within any State, or from *transporting* the provisions to the place at which the troops were stationed? or could he be fined or *taxed* for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the *property* of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit, that the *act* of *purchasing*, or of *conveying* the articles purchased, can be under State control." (Italics ours.)

Here the State seeks such control: to tax appellant for the privilege of storing or of transporting its own gasoline from one piece of its own equipment to another in performing its Federal contract. Interference could not be more burdensome or more direct. If sustained at all, the power is without limit and the immunity of Federal instrumentalities is no more. Fortunately, the asserted power does not exist.

Point No. 4.

Appellant is without adequate remedy at law.

Brief comment only is required to show that appellant has no adequate remedy at law. The objection was not seriously urged below and is without merit.

Under the general law of Louisiana taxes paid under an invalid law cannot be recovered even if paid under protest. Section 14 of the questioned statutes provides in part: "The tax herein levied shall not apply to *sales* to the United States Government or any agency or department thereof, and when such tax is paid by the said United States Government or any agency or department thereof it shall be refunded by the Supervisor of Public Accounts * * *" under conditions stated.

It will be observed that the purported immunity extends solely to a transaction not engaged in by appellant—a sale. Any "use" or "consumption" of gasoline by the Government or in furtherance of a Government contract is left subject to the tax and the unwary taxpayer who parts with his money has lost it for all time.

If more be required it may be noted that no judicial machinery is set up for securing refunds even upon sales. The question of whether or not a right to the refund exists is left wholly to the Supervisor of Accounts from whose adverse ruling there is no redress. Equity alone can afford appellant the relief to which it is entitled on the facts.

The controversy here presented is as old as our dual form of Government. It will recur as long as States attempt to exercise powers which "come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme."

It is respectfully submitted that the judgment be reversed.

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